United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4046

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4046

CARRIER AIR CONDITIONING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

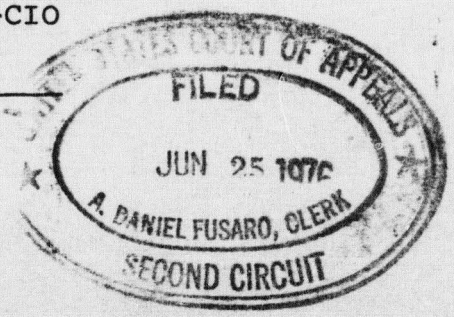
and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO



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INTRODUCTORY STATEMENT

In order not to unduly burden this court, Intervenor's brief herein is limited to certain issues not

addressed by the brief of Respondent National Labor Relations Board ("Board"). Furthermore, Intervenor ("Local 28" or "Union") adopts the Statement of Facts contained in the Board's Brief.1/

SUMMARY OF ARGUMENT

The issues before the court on this appeal concern certain Union activity alleged to violate Sections 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act ("Act")2/ and the validity of a "no-subcontracting clause" contained in

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1/ "A." references are to pages in the printed appendix; "Br." references are to the printed brief of Appellant.

2/ Section 8(b)(4) of the Act provides in relevant part:

> "It shall be an unfair labor practice for a labor organization or its agents --
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is --
>
> * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

certain collective bargaining contracts (A. 31-32) under Section 8(e) of the Act3/ in the context of two distinct jobs in which Carrier variable moduline units with plenum attached were involved -- the Van Etten job, at which Three Boro Sheet Metal and Ventilating Co., Inc. ("Three Boro") was the sheet metal subcontractor, and the Babies Hospital job, at which General Sheet Metal, Inc. ("General") was the sheet metal subcontractor.

With respect to the Van Etten job, the Board's brief addresses the issues of whether the Union engaged in (i) or (ii) conduct under Section 8(b)(4)(B). The Board's decision and its brief here do not, however, reach the question of whether, assuming the Board was in error in finding no (i) or (ii) conduct, such conduct had a proscribed object under 8(b)(4)(B). In that connection, the Union submits that the no-subcontracting clause, if and as applied to the Van Etten job, is a lawful work preservation clause under Section 8(e)4/

3/ Section 8(e) of the Act provides in relevant part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceased or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . ."

4/ Since the unlawfulness of the clause on its face was not alleged in the complaint (A. 40, n. 10), the only issue is its application in these circumstances.

and that any (i) or (ii) conduct designed to enforce or maintain the clause is protected primary activity. Moreover, the Union urges that if there were no unlawful (i) or (ii) conduct in respect to the Van Etten job, then any consideration of whether the no-subcontracting clause violated Section 8(e) in the context of the Van Etten job was not properly before the Board since there was no reaffirmation of the no-subcontracting clause within the six-month period provided by Section 10(b) of the Act.

With respect to the Babies Hospital job, the Union submits that because the no-subcontracting clause is a lawful work preservation clause, its peaceful enforcement by means of initiation of the contractual grievance procedure wherein the remedy sought by mediation and arbitration was limited to the payment of an amount equal to the wages lost by bargaining unit employees as a consequence of breach of the clause violates neither Sections 8(b)(4)(ii)(B) nor 8(e).

ARGUMENT

POINT I

THE BOARD CORRECTLY FOUND NO VIOLATION OF THE ACT WITH RESPECT TO THE VAN ETTEN JOB

A. Introduction

The Board's brief deals with the allegations that

Local 28 engaged in conduct violative of (i) and (ii) of Section 8(b)(4)(B). The arguments made therein in support of the Board's findings of fact and conclusion of law that no such violations occurred will not be repeated here. If this court affirms the Board's conclusion that there was no (i) or (ii) conduct, the object of the conduct and the issues related thereto become irrelevant. See Servette, Inc. v. NLRB, 377 U.S. 46 (1964).

Since the Board found no (i) or (ii) conduct, it never reached the questions of whether such conduct had a proscribed object under Section 8(b)(4)(B) and whether the contract as applied violates Section 8(e). Intervenor submits that if the court finds it necessary to reach those issues, on the basis of the record before the Board this court should conclude that dismissal of the complaint is required.

Finally, the Board did not decide whether there had been such a reaffirmation of the no-subcontract clause as applied to the Van Etten job that the validity of the clause under 8(e) might properly be considered by the Board. Intervenor submits that the validity of the no-subcontracting clause in the context of the Van Etten job was not properly before the Board.

B. The Alleged Activities Of The Union Were Not In Furtherance Of A Proscribed Object Under Subparagraph B Of Section 8(b)(4) And Any Application Of The No-Subcontracting Clause Did Not Violate Section 8(e)

Assuming that the court finds that the Union engaged in any (i) or (ii) conduct in connection with the Van Etten job, it would also have to find that such activity had a proscribed object under subparagraph (B) for there to be a statutory violation. See National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967). For the reasons set forth below, no such conclusion is possible here.

1. The No-Subcontracting Clause Is A Valid Work Preservation Clause

While the Board never expressly made a finding that the no-subcontracting clause was a valid work preservation clause, it did state that there was no basis for finding the clause invalid as written (A. 40, n. 10). Implicit in that finding was a conclusion that the clause was a valid work preservation clause, a finding clearly supported by substantial evidence.

A plenum is no more than a four-sided sheet metal box which serves a variety of purposes, including the housing or receipt of air and noise abatement (A. 33). There is no question about the fact that the fabrication, assembly and installation of plenums for air-conditioning units is work that has been traditionally performed in New York City by Local 28 members and the Board so found:

> "In the New York metropolitan area, Local 28 members have traditionally fabricated and installed plenums on conventional air-conditioning units." (A. 33)

Indeed, from the outset Carrier recognized this to be the case. Thus, when Carrier initially set out to market its variable volume moduline unit, Model 37P, in New York City in 1966, its chief area representative sought out Local 28 and requested that it surrender the work of fabricating and assembling plenums, retaining only the work of installing them as part of the entire, completed unit (A. 181-89, 248-51).5/

5/ Of course, the installation of the plenums, as an assembled component of the system, always remained the work of Local 28 members. Only the fabrication of the plenum and its attachment to the unit is in dispute here.

Local 28, quite naturally, declined this request and insisted that since its members had traditionally performed the work of fabricating, assembling and installing plenums on all central air-conditioning units, old or new, patented or otherwise, its work jurisdiction should not be eroded. It opposed use of the new Carrier units with plenums attached (or, for that matter, any prefabricated units, i.e., plenums already attached) in its jurisdiction.6/

Having failed to obtain this concession from Local 28, Carrier filed no unfair labor practice charges or lawsuits of any kind. Rather, it offered to redesign the unit so as to eliminate the prefabricated plenums and thus allow manufacture and assembly to be done in New York by members of Local 28 (A. 34, 91, 194-95).

On two occasions thereafter, Carrier shipped its redesigned unit to New York without plenums: the "Police Building" job in which members of Local 28 employed by Triangle Sheet Metal Co., Inc. fabricated and assembled the plenums

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6/ There is no evidence that Local 28 ever opposed Carrier units per se; it only opposed their installation where the plenums had not been fabricated and assembled by members of the bargaining unit.

and the "Staten Island" job in which Respondent's members employed by Essex Sheet Metal Works performed this work (A. 34, 255, 272-73). Local 28 members have also fabricated, assembled and installed plenums for variable volume moduline units sold by other manufacturers (A. 534-40).

Carrier seeks to avoid Local 28's long-standing claim to this work by asserting that its moduline unit is patented and that its new model 37A unit, developed in 1970, is designed in such a manner that the fabrication of the plenum and its attachment to the unit must be performed by Carrier's specially trained personnel working in its Tyler, Texas plant.7/

7/ That this claim is actually irrelevant to Carrier's resistance to having the plenums made and assembled in New York is graphically revealed by the testimony of A.G. Contardi, Carrier's New York District Manager, concerning a conversation he had with a Union official about the Staten Island (Essex) job (A. 268; see also A. 202):

> "Q The unit couldn't be sold with the plennum being made in New York; is that what you told them?
>
> A Yes.
>
> Q With respect to that did you review with him the Essex situation?
>
> A Well, he was familiar with the Essex situation. What we said to him was that since the sheet metal contractors, and it's in that particular minutes that you want to look at, were charging $40 a plenum, the unit was economically not feasible."

However, the one element in Carrier's units which is not revolutionary, which exists in the same form as in other units, which is identical or substantially similar to the fabrication, assembly and installation of pre-existing units and which is not patentable, is the plenum (A. 241-43, 483, 598-09, 553). Fabrication, assembly and installation of the plenums for Carrier's units involve substantially the same work as required on both pre-existing units and other manufacturers' versions of the patented "variable volume moduline unit." (A. 542) Moreover, even Carrier's engineering section manager implicitly conceded that assembly of the units other than at the Carrier plant could be effected, but "would be extremely difficult" (A. 417).

In any event, whether or not the Carrier variable volume moduline units represent some improvement in the state of the art, whether the plenums for such units can or cannot be fabricated and assembled in New York City and whether it will cost Carrier more to have the work on plenums performed in New York are considerations that are irrelevant as a matter of law. In National Woodwork Manufacturers Association v. N.L.R.B., 386 U. S. 612 (1967), the Supreme Court held that a clause in a collective bargaining agreement providing that

Union members would not be required to handle any doors which have been "fitted" prior to being delivered to the job site was lawful under Section 8(e) and that a strike to enforce that clause was lawful under Section 8(b)(4)(B). Because the clause was designed and enforced to protect work traditionally performed by members of the Union, the agreement was not "secondary in its aim" and therefore lawful. Id. at 645.

National Woodwork thus established that a clause seeking to preserve work traditionally performed by unit employees is valid, notwithstanding the fact that its effect may be to require an employer to cease doing business with another person and its enforcement may foreclose certain products from a given marketplace. The Court there expressly rejected the argument proferred here by Carrier that Section 8(e) requires that work preservation clauses give way to economic and technological improvements:

> "The Woodwork Manufacturers Association and amici who support its position advance several reasons, grounded in economic and technological factors, why 'will not handle' clauses should be invalid in all circumstances. Those arguments are addressed to the wrong branch of government. It may be 'that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress.'" Id. at 644.

Appellant is unable to refer to a single case for the proposition that its particular design of the variable volume moduline units destroys Local 28's historical claim to this work. Those cases cited by Appellant (Br. 37, n. 34) represent a line of decisions in which the Board had found that the clauses involved were being utilized for the purpose of "acquiring for [the Union's] members work that had not previously been theirs." See National Woodwork Manufacturers Association v. N.L.R.B., supra at 648 (Harlan, J., concurring). Here, since the work of fabricating and assembling plenums for air-conditioning units in New York City, whether Carrier's or other manufacturer's variable volume units, has always been the work of Local 28 members, these cases are clearly distinguishable and inapposite.

Assumimg, arguendo, that the plenums for Carrier's units could not properly be assembled in New York City, nevertheless, there would be no Section 8(e) violation. In that event, the impact on Carrier of the no-subcontracting clause would be no different from the affect of the "will not handle" clause in National Woodwork. Just as the "will not handle" clause there foreclosed manufacturers of prefitted doors from some part of the marketplace, Carrier, here if unable or unwilling to modify its method of manufacture, would be similarly foreclosed from New York City. Section 8(e),

as interpreted by the Supreme Court, permits this result; Carrier's argument in this regard, as the manufacturer's argument in National Woodwork, is simply addressed to the wrong branch of government.

Finally, there is no merit to Carrier's claim that the no-subcontracting clause is invalid here because Local 28's alleged boycott of its units will reduce the work of Local 28's members since other air-conditioning systems allegedly involve less total work for sheet metal workers than do the Carrier units (Br. pp. 38-39). This argument may be rejected simply on the basis that it is not the Board's province or that of this court to inquire into the ultimate wisdom of the Union's position. Furthermore, if Carrier units are not marketed in New York, it can only be a matter of conjecture whether other variable volume air-conditioning systems, now in existence or which may be developed sometime in the future, would produce more or less sheet metal work for Local 28 members. Certainly, to the extent that variable volume systems are the wave of the future (A. 95) and New York City is a substantial market for such units, manufacturers (possibly even Carrier) will have an interest in designing systems in such a fashion as to make them saleable in New York consistent with Local 28's collective bargaining agreement.

In sum, the only relevant inquiry here is the factual one of whether the work of fabricating and assembling plenums for air-conditioning units is work that has traditionally been performed by Local 28 members, and the only possible answer is in the affirmative.

2. Any Union Conduct in Connection with the Van Etten Job was Lawful Primary Activity

Notwithstanding the Supreme Court's holding in National Woodwork, the Board has taken the position that where an employer is party to a lawful work preservation clause, but lacks the power to control the assignment of work within the scope of the work preservation clause, a Union violates Section 8(b)(4)(B) by engaging in a refusal to perform services for that employer to enforce that clause (the "right to control doctrine").

The history of the right to control doctrine, its rejection by five Courts of Appeal, including this court,8/ and the arguments for and against its validity are set forth in the exhaustive majority, concurring and dissenting opinions of the Court of Appeals for the District of Columbia in

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8/ See N.L.R.B. v. Local 28, Sheet Metal Workers', 380 F.2d 827, 830 (2d Cir. 1967) in which this court adopted an analysis of 8(b)(4)(B) that implicitly rejected the right to control doctrine.

Enterprise Association, Local 638 v. N.L.R.B., now before the United States Supreme Court for review. 521 F.2d 885 (1975), cert. granted, ___ U.S. ___, 44 U.S.L.W. 3462 (1976). The majority of the court in that case rejected the Board's test and held that concerted activity to enforce a work preservation clause is protected activity and not violative of Section 8(b)(4)(B).

If the majority in Enterprise is correct, then the alleged Union activity here was lawful, and no further inquiry need be made.9/ We urge this court to adopt the rationale and reasoning of Enterprise and to reaffirm its analysis in N.L.R.B. v. Local 28, Sheet Metal Workers', supra.

9/ While Carrier contends that the right to control test is irrelevant here (Br. 41, n. 38), its arguments about primary and secondary objectives are simply a rehash of the right to control doctrine in another guise. There is no question but that the right to control doctrine has produced much confusion concerning "primary" and "secondary" objectives and the proper characterization of the general contractor, the subcontractor and the manufacturer of prefabricated goods as either the "primary employer" or the "secondary or neutral employer." In all such cases, a union seeking to preserve its work jurisdiction not only has a lawful grievance with the employer of its members (the subcontractor), but also has a complaint with both the general contractor who specifies use of prefabricated goods on a job and the manufacturer who supplies those goods. It is only in the latter respect that the Union's counsel referred to Carrier as the primary (Br. 36, n. 36). It is instructive to note that Carrier's counsel objected to any characterization

Even were this court now to adopt the Board's right to control test, Intervenor submits that the Union's alleged conduct here was lawful. The Board, in the application of its right to control test, requires that the person who is party to a work preservation agreement not have the "actual ability to obtain the work in dispute for there to be a Section 8(b)(2)(B) violation. Local 438, Plumbers & Pipefitters (George Koch Sons, Inc.). 201 NLRB 59, 63 (1973), enforced sub nom. George Koch Sons, Inc. v. N.L.R.B., 490 F.2d 323 (4th Cir. 1973). The Board will:

> ". . . study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an 'unoffending employer' who merits the Act's protection, we shall find no violation in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation." Id. at 64. [footnotes omitted].

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of Carrier as the "primary" (A. 453) for the obvious reason that he recognized that any (i) or (ii) conduct could then lawfully be directed at Carrier. Carrier's real objective here is to insulate everyone involved, the general contractor, the subcontractor and the manufacturer, from any efforts in support of a lawful work preservation clause. See Enterprise Association, Local 638 v. N.L.R.B., supra at 897, n. 29.

Where the employer has contracted away its right to control the assignment of the work, it cannot claim status as a neutral. See, e.g., Pipe Fitters Local 120 (Mechanical Contractors' Ass'n of Cleveland), 168 NLRB 991 (1967); Painters District Council No. 20 (Uni-Coat Spray Painting) 185 NLRB 930 (1970).

In the instant case, the General Counsel failed to sustain its burden of showing that Three Boro did not in fact have the right to control whether it installed the Carrier units with or without plenums attached. On October 8, 1973, Three Boro wrote Acme Climate Control Corporation ("Acme"), the contractor, confirming its agreement to perform fabrication and installation work on the Van Etten job (A. 116-117). Three Boro agreed to install air-conditioning units furnished by others but, cognizant of its contractual obligations to Local 28, stated:

> "We take exception to the following: . . . plenums for Carrier units . . ." (A. 116)

The formal contract between Acme and Three Boro, dated December 6, 1973, described the work to be performed by Three Boro:

> "Article 2
>
> THE WORK
>
> The subcontractor shall furnish and install ductwork as per plans and specifications and as per your quotation dated October 8, 1973 (copy attached)." (A. 115) (Emphasis added)

That Three Boro understood Acme's December 6 acceptance of its offer of October 8 as not obligating it to install Carrier units with plenums attached is evidenced by Three Boro's letter of February 21, 1974, advising Acme that the shipment to it of Carrier units with plenums included was contrary to its contract (A. 140-41).

The foregoing is all the evidence offered by General Counsel in connection with the Three Boro-Acme relationship. General Counsel failed to call anyone from Three Boro, thus permitting the inference that Three Boro would have acknowledged that it had not contracted to install Carrier units with plenums attached.

The Board's right of control test reaches the conclusion that (i) or (ii) conduct directed at the employer who is a party to a work preservation clause violates Section 8(b)(4)(B) only because it is directed at a party who cannot accede to the Union's wishes, i.e., assignment of the disputed work to that employer's employees. Here, at all times, Three Boro asserted the right to have its employees fabricate and install the plenums for the Carrier moduline units, and Acme never made any assertions to the contrary. If one who has voluntarily contracted away its right to do the work is not

a neutral, a fortiori, an employer who insists on his right to perform the work is not a neutral.10/ Thus, the alleged Union activities, i.e., the conduct of the sketcher and Pasquinucci's assertions to Contardi, were simply supportive of Three Boro's contractual claims vis-a-vis Acme. Consequently, such conduct, under the attending circumstances, if either (i) or (ii) in character, could not be held to have been for any unlawful purpose.

Therefore, whether or not the right to control doctrine is applied here, General Counsel failed to prove either a Section 8(b)(4)(B) or 8(e) violation.

C. There was No 8(e) Violation Properly Before the Board in Connection with the Van Etten Job

As found by the Board, the complaint did not allege that the no-subcontracting clause on its face violated Section 8(e) (A. 40, n. 10).11/ Therefore, any issue concerning its validity could only be raised in the context of a "reaffirmation" of the clause. See Danielson v. Masters, Mates & Pilots (Seatrain Lines, Inc.), 521 F.2d 747, 754 (2d Cir. 1975); N.L.R.B. v. Local 28, Sheet Metal Workers', supra.

10/ Three Boro never filed any charges with the Board against the Union.

11/ Any such allegation would have been barred by Section 10(b) of the Act.

In N.L.R.B. v. Local 28, Sheet Metal Workers', supra, this court set forth the applicable rules governing whether there has been reaffirmation of a Section 8(e) clause:

> "The Board cannot hold subsequent application and enforcement of the clause to be an unlawful 'reaffirmation' unless the situation to which the clause is subsequently applied is itself violative of the Act. A 'reaffirmation' in the sense of a declaration of intent to enforce the clause at a suitable time would not constitute an unfair labor practice which could properly be separated from the act of inclusion. See Local Lodge No. 1424 v. National Labor Relations Board, supra. A resort to the clause by the union in a situation to which the clause was irrelevant would be equally innocuous and, like a mere declaration of intent to enforce, would not effect a legally significant 'reaffirmation.' In the present case the Board could find in the union's reliance on Addendum B an unlawful 'reaffirmation' of that clause and a violation of the Act only if the circumstances in which the Union sought enforcement of the clause amounted to an attempt to control 'hot cargo' in a manner itself forbidden by the Act." 380 F.2d at 829-30.

Furthermore, a prerequisite to an 8(e) violation is a finding that both parties to the contract have agreed to or acquiesced in an unlawful application of the agreement; the object of one party is not sufficient. Thus, in Meat and Highway Drivers, Local 710 v. N.L.R.B., 335 F.2d 709, 716 (D.C. Cir. 1964), the court stated:

> "But a finding as to the object of one party to the contract is insufficient (standing alone) to support the conclusion that the contract itself violates § 8(e). Under § 8(e), what the Congress has prohibited are certain contract terms, and -- as contrasted with § 8(b)(4) -- the union's object is not an element of the unfair labor practice. To conclude that a contract term falling within the letter of § 8(e) properly falls within its prohibition, there must be either a finding that both parties understood and acquiesced in a secondary object for the term, or a finding that secondary consequences within § 8(e)'s intendment would probably flow from the clause, in view of the economic history and circumstances of the industry, the locality, and the parties."

See also, Local 1332, International Longshoremen's Association (John C. Peet, Jr.), 151 NLRB 1447, 1451 (1965); Pipe Fitters, Local 539, 167 NLRB 606, 607 (1967).

In connection with the Van Etten job, all of the alleged (i) or (ii) conduct by the Union was unilateral in character and did not involve Three Boro. Furthermore, other than the sketcher incident, the only conduct that could give rise to an allegation of reaffirmation of the subcontracting clause by the Union in connection with the Van Etten job was the following alleged telephone conversation between Contardi and Pasquinucci:

"Contardi: Dan, are you, as a union representative, telling me, as a representative of Carrier, that you will not permit this unit to come in, into New York?

Pasquinucci: That's so." (A. 36)

However, Pasquinucci's statement was no more than a statement of intention which this court has found is not sufficient to constitute a reaffirmation.12/

Moreover, what ultimately happened was that Local 28 took no action at all with respect to the no-subcontracting clause on the Van Etten job. Thus, on February 21, 1974, Three Boro notified Acme by letter that it was objecting to delivery of the Carrier units with plenums attached (A. 140-41).13/ There was a meeting the next day at which Local 28 agreed not to take any action in connection with the Van Etten job (A. 142, 286-87), the Carrier units were delivered to the

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12/ The same rule applies to Stack's statement to Contardi on July 19, 1974 that the Union had decided to "insist that [Carrier] go along with the agreement as written" (A. 37), which, in any event, was long after the Van Etten job.

13/ There is no evidence that this letter was sent as a result of any action on Local 28's part. Three Boro's action in this regard, i.e., assertion of a right to refuse delivery of the plenums, was apparently based on its understanding of its contract with Acme. In any event, any reaffirmation of the contract by Three Boro, against whom no charge was ever filed, is not chargeable to the Union. See Truck Drivers, Local 696 (Freeto Construction Co., Inc.), 149 NLRB 23, 27-28 (1964).

Three Boro. No effort was made by Local 28 to enforce its contract with Three Boro. Therefore, no application of the no-subcontracting clause to the Van Etten job occurred. See Pipe Fitters, Local 539, supra at 607.

The requirement that there be an actual reaffirmation is not a matter of mere semantics. As this court found in the Local 28 case, once the 10(b) period has expired as to an 8(e) clause as originally adopted, any subsequent allegation of an 8(e) violation requires an inquiry into the particular facts and circumstances in which the clause is applied. As presented infra (Point II), even under the right to control test, there is a clear distinction between Section 8(b)(4)(i) or (ii) conduct in support of a Section 8(e) clause, conduct which conceivably could demonstrate an unlawful object, and lawful enforcement of an 8(e) clause by peaceful means, such as utilization of a grievance procedure. In the instant matter, since Local 28 took no action on the Van Etten job to enforce the no-subcontracting clause, there is no basis for concluding that it was reaffirmed. Additionally, there is no basis upon which to predict what manner it would have been applied in the Van Etten case had the Union taken any action.

POINT II

THE UNION VIOLATED NEITHER 8(b)(4)(ii)(B) NOR 8(e) IN CONNECTION WITH THE BABIES HOSPITAL JOB

The Board held that the Union's initiation of the grievance procedure against General, a party to the collective bargaining agreement with the Union containing the no-subcontracting clause, was neither a threat, coercion or restraint under Section 8(b)(4)(ii)(B) nor a violation of Section 8(e), citing and reaffirming its prior decision to that effect in Associated General Contractors of Calif., 207 NLRB 698 (1973), vacated and remanded, 514 F.2d 433 (9th Cir. 1975) (A. 39-40). In so holding, the Board found it unnecessary to reach work preservation and primary-secondary employer issues.

Carrier contends that such issues should have been determined by the Board in the instant case. Even if the Board had considered these issues, the Board would necessarily have concluded that there was no violation of either Sections 8(b)(4)(ii)(B) or 8(e).

In certain respects, the issues raised by the Babies Hospital incident are similar to those already addressed by Intervenor in connection with the Van Etten job. Thus, if the

clause is a valid work preservation clause14/ and if the Board's right to control test is rejected, then there would be no basis for a finding of either Section 8(e) or Section 8(b)(4)(B) violation in this case (See Point I B, supra). However, if the Board's right to control test is correct, then at issue is whether either Section 8(b)(4)(ii)(B) or Section 8(e) is violated by peaceful enforcement of the clause in which the remedy sought is simply that the affected employees be recompensed for their lost wages as a consequence of the breach15/.

We are unaware of any case in which the Board has held that its right to control test applies to Section 8(e)16/.

14/ We have already demonstrated that the no-subcontracting clause is a valid work preservation clause (supra at pp. 6-14).

15/ The grievance filed against General here alleged that the contract violation "has caused and will continue to cause the covered employees monetary losses for which reasonable compensation is sought based upon the loss of manhours of work" (Emphasis supplied.) (A. 145). The settlement of the grievance provided for General's "payment for the loss of manhours of work" in the amount of $2,153.60. (A. 130)

16/ The decision of the Ninth Circuit reversing the Board in Associated General Contractors is the only case to our knowledge that holds that the peaceful enforcement of a work preservation clause where the employer does not have the right to control is an 8(e) violation. For the reasons set forth below, we submit that the Ninth Circuit is in error.

As the Board has noted in right to control cases, it is a well established rule that concerted activity may be unlawful under Section 8(b)(4)(B) if "an object", though not necessarily the only or primary object, of that activity is unlawful, citing N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 680 (1951). See, e.g., Local 438, Plumbers & Pipefitters (George Koch Sons, Inc.), supra, 201 NLRB at 63 n. 23. Thus, the Board holds (ii) conduct against an employer to be unlawful in a right to control case, notwithstanding the existence of a lawful work preservation clause, because it finds that such activity has as another object a termination or change in business relations between secondary employers; in that context, the Board finds the employer to be a neutral in the dispute.

Assuming, arguendo, that this view of National Woodworkers prevails, it does not, however, follow that a similar conclusion must be reached under 8(e) in all circumstances. To the contrary, where the remedy a union seeks from an employer for breach of a work preservation clause is only payment of wages lost by its employees as a consequence of the employer's breach of the agreement, the effect of the agreement as applied in that manner is addressed only "to the labor relations of the contracting employer vis-a-vis his own employees" (386 U.S. at 645); there is no secondary objective.

The minority opinion in Enterprise Association, Local 638 v. N.L.R.B., supra, though accepting the right to control test as applied to economic activity, suggests that peaceful enforcement of a work preservation clause is lawful under Section 8(e). 521 F.2d at 938-40. See also George Koch Sons, Inc. v. N.L.R.B., 490 F.2d 323, 327 (4th Cir. 1973). On the other hand, the majority in Enterprise buttresses its rejection of the right to control test by dismissing the Board's suggestion that its test does not foreclose enforcement of the clause. 521 F.2d at 901, n. 38. But both opinions there find that some enforcement mechanism for work preservation clauses exists irrespective of whether the employer has the right to control, their only difference being whether the means of enforcement must be peaceful or not.

Contrary to Carrier's assertion that the illegal objective of the Union here is to force Carrier to change its method of constructing the moduline unit (Br. 35), the result of contract enforcement as pursued against General leaves Carrier free to market its moduline units in New York City in the manner it has been insisting upon all along. There is no basis for any inference that the Union will proceed

otherwise in the future. To be sure, subcontractors, like General, may now include in any bids for work involving Carrier units an amount necessary to protect themselves against damage for their breach of their Union agreement. Nothing in that result, however, would convert the Union's conduct into an illegal secondary activity.

Danielson v. Masters, Mates & Pilots (Seatrain Lines, Inc.), 521 F.2d 747 (2d Cir. 1975), relied upon by Carrier (Br. 44-45) is not to the contrary. There a collective bargaining agreement required that if the employer sold or transferred his ships, assumption of the employer's collective bargaining agreement by the purchaser was to be a condition of the sale or transfer. The Union sought to enforce this clause through arbitration and the Board initiated Section 10(l) proceedings, seeking an injunction against the arbitration on the ground that the agreement violated Section 8(e).

In affirming the District Court's grant of a preliminary injunction, this court first held, on grounds not relevant here, that the clause in question was not a valid work preservation clause. The court also addressed itself to the Union's claim that it was not seeking to enjoin the

transfer of the ship (and therefore, the agreement did not require the employer to cease doing business with anyone) but only damages for its breach. In rejecting this defense, the court relied on the fact that the damages sought by the Union were lost wages for however long the transferred vessel was manned by non-union personnel, thus permitting the inference that this remedy was simply part of a larger objective of preventing the transfer to one who would not assume the agreement. 521 F.2d at 753. In so holding, this court specifically noted that the "contract does not provide Seatrain with a reasonable alternative (e.g., payment of a fixed sum) that would prevent it to sell a vessel without compliance with Section V(2)(a)(ii) [the clause requiring a successor's assumption of the agreement]." Ibid.17/.

Here, the contract, as applied, does provide a reasonable alternative either to subcontractors refusing to install Carrier units or to a change in Carrier's method of doing business. There is no evidence that the future cost of similar remedies for breach of the no-subcontracting

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17/ The Board also subsequently found that "Seatrains' potential liability for open-ended damages . . . imposes such onerous conditions upon Seatrains' sale of its vessels as to clearly fall within [Sec. 8(e)]." (Emphasis supplied.) Masters, Mates & Pilots, AFL-CIO (Seatrain Lines, Inc.), 220 NLRB No. 52 (1975)

clause, similar in kind to the General settlement, will be so onerous as to restrain or coerce anyone from dealing with Carrier18/. Certainly such a remedy is not so unreasonable as to permit an inference that the Union's real motive here is to prevent Carrier from doing business in New York City. Moreover, Carrier's assertion (Br. 45) that General's temporary cessation of installing the Carrier units was the reaction sought and intended by the grievance filed by the Union is belied by the fact that the Union accepted the settlement proferred by General and took no action to prevent the Carrier units from being installed. These facts

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18/ Carrier argues that since Rule XIX of the collective bargaining agreement (A. 89) permits censure of an employer for any breach of the agreement, the implicit threat of such a penalty is a restraint under Section 8(b)(4)(ii)(B) (Br. 45). Since the complaint never alleged this implicit threat as an 8(b)(4)(ii)(B) violation and no such penalty was either threatened or imposed here, the possibility of its invocation could only be relevant if the validity of the no-subcontracting clause (as amplified by Rule XIX) on its face were before this court, which it is not. The validity of the no-subcontracting clause under 8(e) is only in issue as applied. N.L.R.B. v. Local 28, Sheet Metal Workers', supra. Equally irrelevant is the fact that General for a short time ceased installing the Carrier units. Absent any evidence that General's actions were at the Union's urging, any application of the contract in that manner by General is not chargeable to the Union. See Truck Drivers, Local 696 (Freeto Construction Co., Inc., supra.

demonstrate beyond doubt that the Union's sole objective here was preservation of its work jurisdiction.

Finally, if the agreement as applied is lawful under Section 8(e), it follows that the mere utilization of the grievance procedure to enforce the clause in that manner does not constitute restraint or coercion with a cease doing business object under Section 8(b)(4)(ii)(B). Any other result would be tantamount to a holding that a valid Section 8(e) agreement is unenforceable by any means. See Local 48, Sheet Metal Workers' v. The Hardy Corp., 332 F.2d 682 (5th Cir. 1964).

In summary, what Carrier wants is to have its cake and eat it too. Notwithstanding the uncontroverted fact that Local 28 members have traditionally fabricated and assembled plenums for air-conditioning units for years, Carrier insists not only that its employees have the right to fabricate and assemble the plenums, but that Local 28 members have no remedy whatsoever for the consequent erosion of their work jurisdiction. Nothing in the Act requires that result.

CONCLUSION

For all the foregoing reasons, the Board's dismissal of the complaint should be affirmed.

Respectfully submitted,

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Sheet Metal Workers'
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June 25, 1976

SOL BOGEN
ATTORNEY AT LAW

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June 25, 1976

BY HAND

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Carrier Air Conditioning Company v.
National Labor Relations Board
No. 76-4046

Dear Mr. Fusaro:

Enclosed please find 10 copies of the brief for Interveners Sheet Metal Workers' International Association, Local 28, AFL-CIO. The remaining 15 copies will be retained pursuant to the court rules.

Counsel for the petitioner and respondent have been served this date with copies of the brief, as evidenced by the affidavit of service by mail attached hereto.

Very truly yours,

SOL BOGEN

By Michael W. Fuchs

MWS:de
Encls.
ccs: Elliott Moore, Esq.
Kenneth C. McGuiness, Esq.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CARRIER AIR CONDITIONING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,
Intervenor.

Index No. 76-4046

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

JUDITH LEVINE, being duly sworn, deposes and says:

1. I am not a party to this action, and am over 18 years of age.

2. On June 25, 1976, I served the annexed Brief for Intervenor Sheet Metal Workers' International Assoc. Local 28, AFL-CIO upon Elliott Moore and Kenneth C. McGuiness, attorneys for Petitioner and Respondent, respectively, in this action, at National Labor Relations Board, Wash., D.C. and 1747 Pennsylvania Avenue, N.W., Washington, D.C., respectively, the addresses designated by said attorneys for that purpose, by depositing true copies thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service at 345 Park Avenue, New York, New York 10022.

Judith Levine
JUDITH LEVINE

Sworn to before me
this 25th day of June, 1976

Michael W. Schunck

MICHAEL W. SCHUNCK
Notary Public, State of New York
No. 31-4623412
Qualified in New York County
Commission Expires March 30, 1977